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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1933. No. 419.

GLOBE INDEMNITY COMPANY,
Petitioner,

v.

THE UNITED STATES OF AMERICA, to the use of STEACY-SCHMIDT MANUFACTURING COMPANY, INCORPORATED.

BRIEF OF AMICUS CURIAE.

I. PRELIMINARY STATEMENT.

Truscon Steel Company is use-plaintiff in a suit upon a contractor's surety bond given in connection with the construction of certain public buildings at the United States Veterans' Hospital, Somerset Hills, New Jersey. In this case, the director of construction of the Veterans' Bureau submitted to the Veterans' Administration a detailed statement of the account for the construction of the public improvement, setting forth the facts as to completion and to delay therein, recommending that the work be accepted, that settlement on the basis of the figures set out in the memorandum be approved, that payment of designated

vouchers be authorized and that the matter be submitted to the General Accounting Office for direct settlement. This memorandum was administratively approved by the Director of Veterans' Administration. Suit was instituted on the bond in the District Court of the United States, Eastern District of New Jersey, and there is still undetermined the surety's contention in this suit that Truscon Steel Company does not have the present right to sue on the bond because final settlement has not yet been made by the General Accounting Office.

There is now considerable uncertainty as to what constitutes the date of final settlement within the meaning of the Heard Act, especially where the papers have been forwarded by the administrative department to the General Accounting Office for "direct settlement." Subcontractors no longer know when to start suit on a public works bond. Neither do they know whether it is proper to intervene in a suit first brought where a surety company has made the defense that the action was premature, even though it was instituted more than six months after the executive department having the work in charge administratively determined that the United States had no claim against the contractor's surety bond.

As stated in

Illinois Surety Co. v. United States, to use of Peeler, 240 U. S. 214 (1916), at page 221:

> "It is manifestly of the utmost importance that there should be no uncertainty in the time from which the six month period runs."

In view of the billions of dollars now appropriated by the United States for public work, meritorious claims under the Heard Act should not be subordinated to or delayed by a mere procedural question.

By reason of the importance of the issue involved, as well as the fact that the case at bar is based on a contract which is not a standard Government form, Truscon Steel Company, having obtained the written consent of all counsel of record so to do, respectfully submits these views as *amicus curiae*.

II. ARGUMENT.

POINT A. THE DECISION BELOW POSTPONES UNDULY AND DELAYS UNNECESSARILY THE DATE ON WHICH LABOR AND MATERIALMEN MAY INSTITUTE SUIT ON THE BOND AND HENCE IS IN CONFLICT WITH THE DECISION OF THIS COURT IN ILLINOIS SURETY CO. v. UNITED STATES TO THE USE OF J. A. PEELER, ET AL., 240 U. S. 214, AND THE PURPOSE OF THE HEARD ACT.

The object of the Act of Congress commonly known as the "Heard Act" (the bill which subsequently became the Act of 1894, having been introduced by Congressman John T. Heard), is to assure to the United States that a high grade of subcontractors will bid on public work at low prices because the risk of non-payment is reduced by being shifted to a paid corporate surety. The United States profits if payment to labor and materialmen, in the event that a contractor defaults, is rendered speedy and certain.

> "The public is concerned not merely because laborers and materialmen (being without the benefit of a mechanic's lien in the case of public buildings), would otherwise be subject to great losses at the hands of insolvent or dishonest contractors, but also because the security afforded by the bond has a substantial tendency to lower the prices at which labor and material

will be furnished, because of the assurance that the claims will be paid."

Equitable Surety Co. v. McMillan, 234 U. S. 448, 456 (1914).

If this Act of Congress capable of being so construed by the court as to effect the above purpose is, on the contrary, so construed as to delay the date on which the subcontractor may institute suit on the bond, such a construction of the statute tends to defeat the purpose of the legislation and thus prejudices not only the subcontractor but also the United States.

Until recently the reported cases justified the prevailing opinion that final settlement within the meaning of the Heard Act took place when the amount which the United States was finally bound to pay or entitled to receive was fixed administratively by the executive department having the work of construction in charge, this administrative determination being speedy, clear, fixed by public record and readily ascertainable.

In the following cases, the contract was awarded subsequent to the effective date of the Budget and Accounting Act of 1921. Nevertheless, the several Courts sustained suits brought more than six months but within a year after the department in charge of the construction (*i. e.,* the War Department, Department of Agriculture), determined in the regular course of its administrative duties, that the United States had no claim under the surety bond. The courts held such dates to be the dates of final settlement.

Southern Surety Co. v. Western Pipe & Steel Co., 16 Fed. (2d) 456 (C. C. A., 9th 1926);

United States, to use of Stallings v. Starr, 20 Fed. (2d) 803 (C. C. A., 4th 1927);

Consolidated Indemnity & Ins. Co., v. Smoot, 57 Fed. (2d) 995 (C. C. A., 4th 1932), certiorari denied, 287 U. S. 613;

U. S. F. & G. Co. v. United States, to use of Price, 65 Fed. (2d) 639 (C. C. A., 9th, 1932).

If the only public officer who can make final settlement since the Budget and Accounting Act of 1921 is the Comptroller General, then these cases were decided erroneously.

The only cases which have held that final settlement was made by the General Accounting Office are cases wherein the department having the work in charge was unwilling to take the responsibility of making such an administrative finding and forwarded the record to the Comptroller General for that purpose.

The record in this case does not permit illustrations to show the time which often elapses between the date when an administrative finding that there is no claim by the United States against the surety on the bond is made by the office of the Government having charge of the work of construction and the later date when the office of the Comptroller General audits the accounts.

No reflection is intended to be cast on the General Accounting Office. It is fitting that the formal audit heretofore made by the Treasury Department and now made by the General Accounting Office should proceed as slowly as the circumstances require. It is equally important, however, once it is clear that the United States has no present claim against the surety on the contract bond, that the respective rights and liabilities of the unpaid subcontractors and the surety be speedily ascertained. The General Accounting Office may contend that it is prepared, in proper cases where there is an urgent demand, to make settlement within a few days after all of the facts are pre-

sented to it. Whether or not such delay in the settlement of claims as may take place is due to the fact that the administrative officers have failed to furnish the necessary evidence of the action taken by them or the contractor has failed to furnish some essential evidence, it is obvious that delay must take place if there can be no "final settlement" under the Heard Act until the General Accounting Office audits the records of the department in charge of the construction.

Subcontractors make claims on bonds when contractors default. Usually, where a building contractor on government work defaults, the surety assumes the burden of completion and finds that the sum it must expend to complete the contract, plus the claims of the contractor's unpaid labor and materialmen, exceeds the retained percentage held by the United States. The contractor has no interest in expediting final settlement because there is no pecuniary profit in the transaction for him by reason of his default. The surety may well conclude that, since the amount it is compelled to pay out greatly exceeds the sum which it is to receive from the United States as the retained percentage withheld from the contractor, there is no need for it to accelerate the date on which suit may be instituted against it by unpaid subcontractors. Thus, notwithstanding the efficiency of its auditing force, the lack of data required to make the final audit and sanction payment, may well delay the General Accounting Office.

The executive department having the contract in charge, however, has before it sufficient data to enable it to determine promptly after the completion of the public improvement whether the United States will be required to proceed on the contractor's bond or whether, especially where the surety company completed the contract to the satisfaction

of the United States, the only parties who need the protection of the bond are the unpaid labor and materialmen.

It was not the intent of Congress to require subcontractors to wait an uncertain period until they could commence to prosecute their claims under the public works bond.

> "Just as the fact that the right to sue on the bond is not delayed by the contingency that the determination of the officer may not be approved by the courts" (case) "so it is not to be delayed by the contingency that such determination may not be approved by the Comptroller General's office in its auditing of the accounts."
>
> *Consolidated Indemnity & Insurance Co. v. Smoot*, 57 Fed. (2d) 995 (C. C. A. 4th, 1932), certiorari denied, 287 U. S. 613.

To the same effect is

Arnold v. United States, for use of Guimarin, 280 Fed. 338 (1922) (C. C. A., 4th, 1922).

POINT B. THE PRIOR RIGHTS OF THE UNITED STATES UNDER THE BOND ARE AMPLY PROTECTED IF LABOR AND MATERIALMEN MAY SUE SIX MONTHS AFTER THE EX PARTE ADMINISTRATIVE DETERMINATION BY THE DEPARTMENT HAVING THE WORK OF CONSTRUCTION IN CHARGE OF THE AMOUNT DUE TO OR FROM THE CONTRACTOR, BECAUSE THE HEARD ACT DOES NOT CONSTITUTE A LIMITATION ON THE UNITED STATES.

It was the purpose of the amendment of 1905 to remedy the defect in the Act of 1894 by assuring to the United

States adequate opportunity to enforce its demands against the contractor's surety and priority with respect to such demand.

Illinois Surety Co. v. United States to use of Peeler, 240 U. S. 214, 218 (1916).

This purpose was accomplished by requiring other creditors to refrain from suit for a period of six months after completion and final settlement and providing that, if the United States has a claim under the bond, it should have priority over other claimants.

As thus restricted, the provisions of the statute were to be beneficent for the subcontractors.

United States v. Geo. F. Pawling Co., 297 Fed. 65 (C. C. A., 3rd 1924).

The construction of the statute for which this brief contends will not prejudice the United States because subcontractors are required, in any event, to refrain from suit for a period of six months after final settlement by the administrative department and the institution of a timely suit by a subcontractor, does not prejudice the United States because the Heard Act does not constitute a limitation on the United States.

United States v. Marshall, 225 Fed. 687 (1914), affirmed 225 Fed. 760 (C. C. A. 2nd, 1915);

Antrim Lumber Co. v. Hanan, 18 Fed. (2d) 548, (C. C. A., 8th) (1927).

These cases hold that the United States may sue on the bond even after the expiration of the period of one year after final settlement.

While the Heard act is ambiguous, its purpose is bene-

ficial, and the courts should try to give coherence to its provisions and accomplish the intention of Congress.

Bryant Co. v. N. Y. Steamfitting Co., 235 U. S. 327 (1914);

London & L. Indemnity Co. v. Smoot, 287 Fed. 952 (1923) (C. A., D. C.).

POINT C. THE CASE OF LAMBERT LUMBER CO. v. JONES ENGINEERING CO., 47 FED. (2d) 74, CERTIORARI DENIED, 283 U. S. 842, DOES NOT GOVERN IN THE CASE AT BAR BECAUSE, IN THE LAMBERT CASE, THE VETERANS' ADMINISTRATION DID NOT TO MAKE FINAL SETTLEMENT AS DEFINED BY THIS COURT IN ILLINOIS SURETY CO. V. UNITED STATES TO THE USE OF J. A. PEELER, ET AL., 240 U. S. 214.

The record in the Lambert case shows that the principal contract was required to be completed on or before September 3, 1924. The work was actually completed September 20, 1924. The contract required liquidated damages at the rate of Fifty Dollars a day to be deducted. There were certain extensions granted to the contractor because of abnormal weather conditions. Various officials of the Veterans' Administration corresponded with the contractor and in due course the contractor submitted an executed release of all claims under the contract in consideration of the payment by the United States of the sum of $10,975.39. This sum was computed by deducting from the unpaid balance of the contract price $850.00; *i. e.*, delay of seventeen days at the rate of Fifty Dollars per day. A voucher for $10,975.39 was prepared and then the papers were forwarded to the General Accounting Office, accompanied by a

letter, which is quoted on page 76 of the printed report of the case. This letter shows conclusively that the Director of the Veterans' Administration forwarded the record to the Comptroller General to compute the amount payable to the contractor because of the delay in completion and the abnormal weather conditions during the performance of the work. This letter, taken as a whole, shows clearly that the Veterans' Administration did not undertake to make a final settlement, or any settlement whatever, but that it had merely examined the account, obtained from the contractor an agreement on the amount which he would accept in satisfaction of his claim, and then the Veterans' Administration, without either an express approval or even a recommendation, passed the burden of making settlement to the Comptroller General. Thus the "final settlement" made by the Comptroller General in the Lambert case was the only settlement made by any governmental authority.

The decision in the Lambert case is reconcilable with the Peeler decision and the contention of the petitioner in the case at bar. An inspection of the printed briefs in the Peeler case shows conclusively that this final settlement letter had not been approved by the auditor of the Treasury Department or the Comptroller of the Treasury (transcript of record, Peeler case, p. 38). The surety in the Peeler case contended that final settlement could be made only by such auditor and not by the Secretary of the Treasury (Brief, p. 21). However, appreciating the importance of removing all uncertainty, as far as possible, as to the date from which the time limit would begin to run, the Court definitely held that the statute contemplates the ex parte "administrative" determination of the amount due to or from the contractor under the contract. It decided that final settlement took place on the date the Secretary of

the Treasury approved the final settlement letter submitted by the Supervising Architect.

Respondent's contention is that since the Budget and Accounting Act of 1921 there can be no final settlement under the Heard Act except by the Comptroller General. Such a holding is contrary to a reasonable interpretation of the decision in the Peeler case and goes beyond the decision in the Lambert case. Administrative settlements at the time of the Peeler case were subject to audit and adjustment by the regular accounting officers, just as they now are.

McKnight's Case, 13 Ct. Clms. 292 (1877);
United States v. Waters, 133 U. S. 208, 215 (1889).

If respondent's contention is sound, then this Court, when a like contention was made by the surety in the Peeler case, would have held that an auditor for the Treasury Department or the Comptroller of the Treasury was required to pass upon the recommendation of the Acting Supervising Architect, or upon the approval thereof by the Secretary of the Treasury before the six months' period started to run. This Court, however, decided the issue adversely to the contention now made by the appellee.

It is clear from the opinion in the Peeler case that this Court used the word "administrative" to show reference to executive department determination rather than settlement by officials who are now part of the General Accounting Office. Even the majority opinion of the Circuit Court of Appeals in the case at bar concedes that up to July 1, 1921, the Department of the Interior had authority to make the administrative finding, which prior to the Budget and Accounting Act of 1921 would have constituted final settlement under the Heard Act (R. 55).

A comparison of the respective Acts of Congress shows conclusively that the Budget and Accounting Act of 1921

transferred to an independent governmental agency the duties theretofore performed by six auditors in the Treasury Department and the Comptroller of the Treasury. Hence, it logically follows that since the Department of the Interior assumed the responsibility vested in it by law and found in the final settlement letter of June 16, 1927 (R. 24-28) that the United States had no claim on the bond, (*i. e.*, by determining that the United States was indebted to the contractor in the sum of $8899.30 and approving payment in that amount), final settlement took place on June 16, 1927, and an audit by the successor to the auditor of the Treasury Department was not essential to inaugurate the limitation as to time for suit prescribed by the Heard Act.

POINT D. THE FINAL SETTLEMENT LETTER OF THE DEPARTMENT OF THE INTERIOR COMPLIED WITH THE RULING OF THE COMPTROLLER GENERAL PROHIBITING THE DEPARTMENT OF THE INTERIOR FROM DECIDING QUESTIONS PERTAINING TO LIQUIDATED DAMAGES.

The work in the case at bar was delayed one hundred sixty-three days and the specifications prescribe twenty-five dollars per day as liquidated damages (R. 24).

The principal contract in the case at bar, dated June 26, 1926 (R. 17-18), is a short agreement which lacks the many uniform general provisions and requirements contained in the present standard form of Government contract. These standard forms, approved by the President on November 19, 1926, are set out in the volume on *"Government Contract Law and Administration,"* by Joseph P.

Tanney, Esq., of Washington, D. C. Standard Construction Contract form No. 23 appears on page 148 and Standard Supply Contract form No. 32 appears on page 178.

Article 5 of supply contract form No. 32 and article 9 of construction contract form No. 23 deal with liquidated damages in the event of delay, as well as the remission thereof if the delay in completion of the contract is due to unforeseen causes beyond the control and without the fault or negligence of the contractor.

Paragraph 11 of the specifications accompanying the principal contract in the case at bar contains a provision with reference to this point and to the rights of the Department of the Interior (R. 28), termed the "administrative office" by the Comptroller General (R. 30). These specifications are not on the record.

It is obvious that the Department of the Interior, when it administratively found that it had no claim under the contractor's bond in the case at bar and forwarded the papers to the office of the Comptroller General, reciting the delay in completion by the contractor, adopted the practice prevailing where the standard Government form of contract is used and there is such delay.

It has been held that, where the agreement provides for the remission of liquidated damages if the Government has suffered no damage or inconvenience on account of the delay, the official named in the contract has power to remit the same.

> "We do not mean to disturb the salutary rule relative to the power of Government officials or agents to waive or release claims or assets of the Government, nor do we do so in this case."
>
> *Pacific Hardware & Steel Co. v. United States*, 49 Court of Claims 327, 335 (1914).

It is also clear that the Secretary of the Interior, as well as the respective secretaries of the other departments, represents the President, and that they exercise the power on the subjects confided to their respective departments.

United States v. Jones, 59 U. S. 94, 95 (1855).

However, as Mr. Tanney points out:

> "The provision in this article for not charging the contractor with liquidated damages for delays due to unforeseeable causes beyond the control of the contractor arising without his fault or negligence has been the subject of a great deal of discussion between the administrative officers and the accounting officers. The administrative officers logically claiming the right to extend time for performance for such delays, or to remit damages for such delays; and the accounting officers contending that in view of the fact that when a delay occurs there is a resulting claim for damages on behalf of the Government, it is within their province to settle and adjust such claim; contending further that the province of the administrative officers is limited to a finding of facts and the extent of delay."

Tanney, *Government Contract Law,* pp. 60, 61.

The Comptroller General has rendered a formal decision, holding that the Interior Department may not waive liquidated damages for delay. This decision was given in connection with a contract which contained the standard provision that the collection of liquidated damages might be waived in whole or in part in the discretion of the Secretary of the Interior. The Comptroller General held:

> "However, it may be proper to state in this connection that where the right to deduct or collect liquidated

damages accrues to the Government under a contract, there is no jurisdiction or authority in any administrative officer of the Government to waive such right either pursuant to a provision in the contract, or otherwise, unless such jurisdiction or authority is specifically granted by statute. There is no statute authorizing the inclusion of such provision in contracts made by the Commissioner of Patents or any other officer of the Interior and such provision should be omitted from any contracts hereafter" (5 Comp. Gen. 750).

The collected opinions of the Comptroller General show that there are many cases where administrative officers have remitted damages or extended time for completion by reason of delays due to unforeseen causes beyond the control of the contractor, arising without the contractor's fault or negligence, and subsequently the Comptroller General has reversed the decision of the administrative department.

"As a result many times when administrative officers have remitted damages or extended time for such delays, the sums involved have been suspended or disallowed."

Tanney, *Government Contract Law*, p. 61.

The above explains why the Department of the Interior administratively found the facts, approved an indebtedness by the United States to the contractor in the sum of $8,899.30 and forwarded the papers to the General Accounting Office for its regular audit and the voucher for countersignature and payment (R. 24). Here, unlike the Veterans' Administration in the Lambert case, the Department of the Interior exercised its vested authority, using a final settlement letter in many respects similar in form to that used by the Treasury Department in the Peeler case.

True, the amount payable to the contractor as approved by the Department of the Interior might be increased if the liquidated damages were remitted, but such a contingency does not delay the date of final settlement under the Heard Act. The courts have frequently held that the amount determined to be due the contractor might subsequently be changed by other tribunals before whom the matter might be brought.

For illustration, see

United States to use of Stallings v. Starr, 20 Fed. (2d) 803 (C. C. A., 4th 1927),

wherein it was held:

> "There may be a final settlement between the government and the contractor, so as to fix the rights of the creditor under the statute, notwithstanding the balance may be subject to change; for, when the government has clearly indicated that it has no further claim against the surety, a final settlement within the purview of the act has taken place. U. S. v. Title Guaranty & Surety Co. (C. C. A. 7th), 254 F. 958; Robinson v. U. S. (C. C. A. 2d), 251 F. 461" (p. 807).

Hence it is clear that the authority possessed need not be such as to enable the administrative officer to take conclusive action.

CONCLUSION.

The construction of the Budget and Accounting Act of 1921 for which respondent contends is neither mandatory in view of the construction placed on substantially similar Acts of Congress, nor necessary to preserve the prior rights of the United States.

There is adequate authority to warrant a decision that, if the department having the contract in charge makes the administrative determination called final settlement, the date of such final settlement constitutes the first day of the six months during which the Heard Act gives the United States the sole right to sue.

A decision in respondent's favor in the case at bar may well be a Pyrrhic victory. The average Federal public improvement is not completed until many months after a subcontractor furnishes his labor and material. Thus, even where final settlement is made by the department having the contract in charge, subcontractors, in nearly every case, must wait a considerable period of time after they furnish their labor or material. If this Court holds that the date of final settlement under the Heard Act must be further delayed until the General Accounting Office audits the transaction, the value of the bond as an instrument to induce responsible subcontractors to bid on public work and to lower their prices, *i. e.*, the public benefit as recognized in *Equitable Surety Co. v. McMillan,* 234 U. S. 448, 456 (1914) (p. 3, of this brief), will be diminished.

Since the language repeated in the Budget and Accounting Act of 1921 does not make imperative the construction for which respondent contends, it is respectfully submitted that your Honorable Court should hold that, when the de-

partment in charge of the work states the account and, by a departmental record signed by an appropriate officer thereof, finds that the United States does not have a claim against the contractor's surety bond, final settlement as contemplated by the Heard Act has taken place. As such determinations are regularly made in the course of administration, nothing is gained by postponing the date from which to reckon the six months.

Illinois Surety Co. v. United States, to the use of Peeler, 240 U. S. 214, 218 (1916).

Respectfully submitted,

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